(4)

SHDKT PROCEEDINGS AND ORDERS DATE: [10/13/95]

CASE NBR: [94101419] CFH STATUS: [DECIDED]
SHORT TITLE: [Wood, Supt., WA St. Pen.]
VERSUS [Bartholomew, Dwayne] DATE DOCKETED: [021495]
PAGE: [01]

~~~~~~~~DATE~~~~NOTE~~~~~~~~~~~~~~~~~~~PROCEEDINGS & ORDERS~~~~~~~~~~~~~~~~~~~~

1	Feb 14 1995	G	Petition for writ of certiorari filed.
2	Mar 20 1995		Brief of respondent Dwayne Bartholomew in opposition filed.
3	Mar 20 1995	G	Motion of respondent for leave to proceed in forma pauperis filed.
4	Mar 29 1995		DISTRIBUTED. April 14, 1995 (Page 13)
6	Apr 17 1995		REDISTRIBUTED. April 21, 1995 (Page 16)
7	Apr 21 1995		Record requested -- AMK.
9	Apr 24 1995		Record filed.
		*	Proceedings from USCA/9 and USDC, Western District of Washington. (1 box)
10	May 17 1995		REDISTRIBUTED. May 19, 1995 (Page 14)
12	May 22 1995		REDISTRIBUTED. May 26, 1995 (Page 15)
14	May 30 1995		REDISTRIBUTED. June 2, 1995 (Page 12)
16	Jun 5 1995		REDISTRIBUTED. June 9, 1995 (Page 13)
18	Jun 12 1995		REDISTRIBUTED. June 16, 1995 (Page 14)

PREVIOUS 1 1 EXIT

Last page of docket

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20	Jun 19 1995		REDISTRIBUTED. June 23, 1995 (Page 16)
22	Jun 26 1995		REDISTRIBUTED. June 29, 1995 (Page 1)
24	Sep 18 1995		REDISTRIBUTED. September 26, 1995 (Page 135)
26	Oct 2 1995		REDISTRIBUTED. October 6, 1995 (Page 23)
27	Oct 10 1995		Motion of respondent for leave to proceed in forma pauperis GRANTED.
28	Oct 10 1995		Petition GRANTED. Judgment REVERSED and case REMANDED Dissenting opinion by Justice Stevens with whom Justice Souter, Justice Ginsburg and Justice Breyer join. Opinion per curiam.

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

TANA WOOD, Superintendent,

Petitioner,

v.

DWAYNE EARL BARTHOLOMEW,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Due Process Clause, as applied in *Brady v. Maryland*, 373 U.S. 83 (1963), require prosecutors to disclose information that neither is admissible in evidence nor will lead to admissible evidence, if the information may affect the preparation or presentation of the defense?

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

I. OPINIONS BELOW

The opinion of the Court of Appeals is reported at 34 F.3d 870 (9th Cir. 1994) and appears at Appendix A. The opinion of the District Court for the Western District of Washington, which was not published, is at Appendix B.

II. JURISDICTION

The judgment of the Court of Appeals was entered on September 6, 1994. Petitioner's timely petition for rehearing with suggestion for rehearing *en banc* was denied in an order entered November 16, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

Title 28, Section 2254(a) of the United States Code provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

IV. STATEMENT OF THE CASE

Dwayne Bartholomew was convicted by jury verdict in Washington state court of aggravated first degree murder and sentenced to life without parole. On August 1, 1981, Bartholomew shot and killed a Tacoma laundromat attendant, Paul Turner, in the course of a robbery. On August 5, 1981,

Rodney Bartholomew told the police that his brother, Dwayne Bartholomew, had committed the crime. Following his arrest, Dwayne Bartholomew admitted that he had robbed the laundromat and that he had shot Turner. Although he had fired two shots, he claimed the shooting was accidental.

Bartholomew was charged with aggravated first degree murder. The sentence for this crime is either death or life without the possibility of parole. Wash. Rev. Code § 10.95.030. To prove aggravated murder, the prosecution had to show (among other elements) that the murder was premeditated. Wash. Rev. Code §§ 9A.32.030(1)(a), 10.95.020. If the prosecution failed to show that the killing was premeditated, Bartholomew could have been convicted only of felony murder. Wash. Rev. Code § 9A.32.030(1)(c). The sentence for this crime is life with the possibility of parole. Wash. Rev. Code § 9A.32.040. The proof at trial thus focused on whether the killing was premeditated or accidental.

Before trial, the prosecution conducted polygraph examinations of Rodney Bartholomew and his girlfriend, Tracy Dormady, who had been with Rodney when Dwayne committed the murder. Rodney was asked two relevant questions: (1) "Did you in any way help Dwayne to rob the laundromat on August 1, 1981?", and (2) "On August 1, 1981, at any time were you and Dwayne inside the laundromat at the same time?" Rodney

answered in the negative to both questions. His answers were consistent with his earlier statements to the police. The polygrapher, however, concluded that Rodney's reactions to the questions indicated deception.

Ms. Dormady was also asked two relevant questions: (1) "Did you in any way help Dwayne rob the laundromat on August 1, 1981?", and (2) "Did you at any time on August 1, 1981, hold Dwayne's gun?" Ms. Dormady answered in the negative to both questions, again consistently with her statements to the police. The polygrapher concluded that her answers were truthful.

The prosecution did not inform the defense of the polygraphs before trial because the Washington Supreme Court had held that polygraphs are inadmissible as evidence, and because the prosecutor did not believe that polygraphs could accurately determine whether a witness was lying.

At trial, Rodney Bartholomew testified that he and Tracy Dormady went to the laundromat on the evening of August 1, 1981, to do their laundry. Dwayne Bartholomew was sitting in his car in the parking lot when they arrived. While waiting for the laundry, Rodney sat with Dwayne in his car. Dwayne told Rodney that he intended to rob the laundromat and "leave no witnesses." Rodney and Tracy left the laundromat shortly thereafter. Soon after they arrived at Ms. Dormady's house,

Dwayne Bartholomew arrived. Tracy asked him if he had killed the attendant and Dwayne said "he had put two bullets in the kid's head." Tracy also testified that she had heard Dwayne say he intended to leave no witnesses. Rodney and Tracy both testified consistently with their statements to the police and their answers to the polygraph questions.

Bartholomew's counsel cross-examined both Rodney and Tracy vigorously. In particular, counsel challenged their testimony that they had not helped Dwayne commit the crime.

The prosecution also put on evidence that the gun Dwayne used could not be discharged accidentally. Bartholomew's pistol was a single-action revolver. To fire such a gun, Bartholomew had to do two things: he needed to cock the hammer, which required him to pull the hammer a full one and 7/16 inch from its stop back to the firing position; and he had to pull the trigger. Bartholomew testified that, as to the first shot, he had pulled the hammer back, but did not intend to pull the trigger. However, Bartholomew fired two shots. This means that, after shooting once, Bartholomew must have intentionally pulled the hammer back, and again pulled the trigger. Bartholomew thus took at least one purposeful shot at the victim.

Dwayne Bartholomew was the only defense witness. He testified that he went to the laundromat intending to rob it. He admitted he had threatened the victim with his gun and forced

him to lie on the floor. He testified that while he was removing the money from the till, his gun accidentally fired, discharging a bullet into the victim's head. He claimed that as he fled with $237 from the robbery, the gun accidentally fired a second time.

Dwayne denied telling Rodney and Tracy that he intended to leave no witnesses. He also testified that Rodney had assisted in the robbery. According to Dwayne, Rodney waited outside the laundromat until it closed. He then persuaded the attendant to unlock the doors on the pretense of having to use the bathroom. This allowed Dwayne to follow Rodney into the laundromat. After Rodney had left, Dwayne proceeded with the robbery.

The jury found Bartholomew guilty of aggravated first degree murder. After the guilt phase of the trial, the defense discovered that the polygraphs existed, and moved for a new trial. The trial court denied the motion because polygraphs were inadmissible under Washington law. The Washington Supreme Court affirmed the trial court's decision regarding the polygraphs. *State v. Bartholomew*, 98 Wash. 2d 173, 654 P.2d 1170 (1982), *vacated and remanded on other grounds sub nom. Washington v. Bartholomew*, 463 U.S. 862 (1983). Dwayne Bartholomew ultimately was sentenced to life without the possibility of parole.

In habeas corpus proceedings in the District Court, Bartholomew claimed, among other things, that the failure of the prosecution to divulge the polygraph results before trial violated *Brady v. Maryland*, 373 U.S. 83 (1963). In an evidentiary hearing, Bartholomew's trial attorney and Rodney Bartholomew both testified. The trial attorney said that he was well aware that Rodney may have been lying, and that disclosure of the polygraph would not have changed his pretrial investigation, his trial strategy, or his cross-examination of Rodney Bartholomew. Upon examination by Bartholomew's habeas counsel, Rodney again affirmed that he had not helped Dwayne with the crime, and that he had testified truthfully at trial. The entire transcript of Rodney's examination -- totalling five pages -- is attached as Appendix C. Bartholomew's habeas attorney did not develop any evidence from his examination of Rodney, or from any other source, that would support a conclusion that disclosure of the polygraph would have led to new evidence or a better cross-examination.

The District Court held that Bartholomew had not proved either that disclosure of the polygraphs would have led to evidence admissible at trial, or that he had been prejudiced by nondisclosure. The Court denied the petition.

The Court of Appeals reversed. It recognized that the polygraphs were inadmissible as evidence under Washington law,

and that the polygraphs themselves were thus not *Brady* evidence. The Court held, however, that nondisclosed information could violate *Brady*, even if it were inadmissible, if the information could have improved the "preparation or presentation" of the defendant's case:

> We need not, however, determine whether Dwayne Bartholomew could have introduced the polygraph results, for we conclude that the non-disclosed polygraph test satisfied *Brady*'s materiality requirement regardless of whether or not it was admissible. In *United States v. Kennedy*, 890 F.2d 1056 (9th Cir.1989), *cert. denied*, 494 U.S. 1008, 110 S. Ct. 1308, 108 L. Ed. 2d 484 (1990), we stated that "[t]o be material under *Brady*, undisclosed evidence *or evidence acquired through that information* must be admissible." *Id.* at 1059 (emphasis added). The *Kennedy* court noted that "in determining the materiality of undisclosed information, a reviewing court may consider 'any adverse effect that the prosecutor's failure to respond might have had *on the preparation or presentation* of the defendant's case.'" *Id.* (quoting *Bagley*, 473 U.S. at 683, 105 S. Ct. at 3384) (emphasis added). The failure to disclose the polygraph results clearly impaired Dwayne Bartholomew's ability to prepare and present his case.

34 F.3d at 875.

Although Bartholomew had presented no evidence whatever that the polygraph would have led to admissible evidence, or that his defense would have been improved in any way, the Court speculated that the polygraph result "would likely" have strengthened the cross-examination of Rodney and

Tracy. 34 F.3d at 874. The Court said that trial counsel "likely" would have taken Rodney's deposition. Had there been a deposition, the Court said that trial counsel "might" have succeeded in obtaining an admission from Rodney that he was lying, or "likely" would have obtained information useful to a cross-examination. 34 F.3d at 875-76. The Court did not, however, identify one piece of admissible evidence that the defense could have used in cross examination, because Bartholomew did not prove such evidence existed.

V. REASONS FOR GRANTING THE WRIT

This Court should grant the writ to clarify whether the due process clause, as applied in *Brady v. Maryland*, 373 U.S. 83 (1963), requires prosecutors to disclose information that neither is admissible in evidence nor leads to admissible evidence. *Brady* and its progeny discuss whether evidence is "material either to guilt or punishment," and indicate that the obligation to disclose is limited to admissible evidence. *Brady*, 373 U.S. at 87. However, this Court later suggested in *United States v. Bagley*, 473 U.S. 667, 683 (1985), that evidence is "material" if the "preparation or presentation" of the defense would have been different had the evidence been disclosed. In reliance on this language in *Bagley*, the Ninth Circuit expanded *Brady* to require disclosure of all information -- whether

admissible or not – that may affect the "preparation or presentation" of the defense.

Because this Court has never conclusively established whether *Brady*'s obligation to disclose is limited to admissible evidence, the Courts of Appeals are uncertain about the application of *Brady*. Some Circuits hold that the suppressed information itself must be admissible evidence. Other Circuits hold that the suppressed information, if not itself admissible, must lead to admissible evidence. And in this case, the Ninth Circuit found a *Brady* violation even though no admissible evidence was identified.

Review is also appropriate because the Ninth Circuit speculated on whether the polygraph information could have changed the course of trial. Speculation regarding prejudice is contrary to the burden of proof for both *Brady* claims and habeas relief. Finally, the Ninth Circuit's decision effectively imposes a constitutional discovery rule on prosecutors who, to avoid reversal on appeal, will need to disclose all information they receive regarding a criminal case. This Court has expressly held that *Brady* does not create a constitutional discovery rule. This Court should grant review to clarify its previous decisions regarding *Brady*, to reaffirm the defendant's burden of proof,

and to provide a single, comprehensive standard for the courts to apply. The decision of the Ninth Circuit should be reversed[1].

A. The Ninth Circuit's Decision Conflicts with *Brady*, which Holds that Suppression of Information Does Not Violate Due Process Unless the Information Is Admissible in Evidence.

Brady v. Maryland, *supra*, holds that suppressed information violates due process only when it can be admitted into evidence:

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment
> . . . .

373 U.S. at 87 (emphases added). In Brady's state court appeal, the Maryland court ruled that the suppressed evidence was admissible only for purposes of Brady's sentence, not his guilt. As this Court explained in *United States v. Agurs*, 427 U.S. 97, 105-106 (1976), *Brady* held that the evidence was not material precisely because it was inadmissible with regard to guilt:

> The Court interpreted the Maryland Court of Appeals opinion as ruling that the confession was inadmissible on that [guilt] issue. For that reason, the confession could not have affected

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[1] This Court is also considering the application of *Brady* in *Kyles v. Whitley*, No. 93-7927. Although both *Kyles* and this case involve the "materiality" standard of *Brady*, this case addresses a separate ambiguity in *Brady*. *Kyles* addresses how severe an effect on the defense must be to be "material;" this case addresses what information must be disclosed.

> the outcome on the issue of guilt but could have affected Brady's punishment. It was material on the latter issue but not the former.

(Emphases added; footnote omitted.)

This Court's other decisions regarding *Brady* claims all involve evidence that is admissible either on direct examination or on cross-examination. *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), *Pyle v. Kansas*, 317 U.S. 213, 216 (1942), and *Napue v. Illinois*, 360 U.S. 264, 269 (1959), which preceded *Brady*, each involved the prosecution's knowing use of perjured testimony. The cases following *Brady* similarly discuss the due process implications of the suppression of evidence. See *Giglio v. United States*, 405 U.S. 150 (1972); *Moore v. Illinois*, 408 U.S. 786 (1972); *United States v. Agurs*, 427 U.S. 97, 105-106 (1976); *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982); *California v. Trombetta*, 467 U.S. 479 (1984); *United States v. Bagley*, 473 U.S. 667, 674 (1985); *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *Arizona v. Youngblood*, 488 U.S. 51 (1988); and *Kyles v. Whitley*, No. 93-7927.

Although *Brady* and its progeny refer solely to admissible evidence, the Ninth Circuit held that withholding the inadmissible polygraph violated *Brady* because it may have had an effect on the "preparation or presentation" of Bartholomew's defense. 34 F.3d at 875. The Court of Appeals cited *United States v. Bagley, supra*, as its authority. In discussing whether

suppressed evidence is "material," the plurality opinion in *Bagley* stated that a reviewing court may consider "any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case." 473 U.S. at 683.

The Ninth Circuit took this language out of context. *Bagley* does not hold that suppression of inadmissible information can violate due process. To the contrary, *Bagley* emphasized that its holding involved suppression of evidence, an element entirely missing from Bartholomew's case:

> Thus, the prosecutor is not required to deliver his entire file to counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the accused of a fair trial . . . .

473 U.S. at 675 emphasis added; footnote deleted). Further, in its sole statement on the issue here presented, this Court said that *Brady* is not violated merely because information may have an effect on the preparation or presentation of the defense:

> It has been argued that the standard should focus on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, rather than the materiality of the evidence to the issue of guilt or innocence. . . . Such a standard would be unacceptable . . . for two reasons. First, the standard would encompass incriminating evidence as well as exculpatory evidence, since knowledge of the prosecutor's entire case would always be useful in planning the defense. Second, such an approach would primarily involve an analysis of the adequacy of

> the notice given to the defendant by the State, and it has always been the Court's view that the notice component of due process refers to the charge rather than the evidentiary support for the charge.

United States v. Agurs, 427 U.S. at 112 n. 20. The Ninth Circuit's decision thus takes *Bagley* out of context, and conflicts both with *Agurs* and the holding of *Brady* itself that suppressed information is not material unless it is admissible evidence[2]. This Court should grant certiorari to clarify that the duty to disclose under *Brady* is limited to admissible evidence.

B. Certiorari Is Necessary to Guide the Courts of Appeals Regarding the Application of *Brady* to Information that Is Not Admissible in Evidence.

The Courts of Appeals apply *Brady* in widely different ways. The First, Third, Fifth, Seventh, Tenth, and Eleventh Circuits follow the express language of *Brady*, and require disclosure only of information that itself is admissible in evidence. *United States v. Oxman*, 740 F.2d 1298, 1311 (1st

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[2] This Court has also held that due process is not necessarily violated even when evidence is withheld. In *California v. Trombetta*, 467 U.S. 479, 488-89 (1984), the prosecution destroyed arguably exculpatory evidence. Citing *Agurs*, the Court held that due process does not require the State to preserve all evidence. The state must preserve evidence only when it possesses an exculpatory value that is apparent before it was destroyed, and is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. 467 U.S. at 488-489. If the prosecutor in *Bartholomew* had destroyed rather than suppressed the polygraph, Bartholomew would not be entitled to relief under this test.

Cir. 1984) ("In order to be material, evidence suppressed must have been admissible at trial"), *vacated on other grounds*, 473 U.S. 922 (1985); *United States v. Ranney*, 719 F.2d 1183, 1190 (1st Cir. 1983) ("Inadmissible evidence is by definition not material, because it never would have reached the jury and therefore could not have affected the trial outcome"). Other cases that reach the same result are *United States v. Ramos*, 27 F.3d 65, 71 (3rd Cir. 1994); *Blackmon v. Scott*, 22 F.3d 560, 564 (5th Cir. 1994); *United States v. Hartmann*, 958 F.2d 774, 790 (7th Cir. 1992); *United States v. Pedraza*, 27 F.3d 1515, 1527 (10th Cir. 1994); *Nelson v. Nagle*, 995 F.2d 1549, 1555 (11th Cir. 1993); and *United States v. DeLuna*, 10 F.3d 1529, 1534 (11th Cir. 1994).

Other Circuits hold that *Brady* is violated when the suppressed information is not admissible but would lead to admissible evidence. Before its decision in *Bartholomew v. Wood*, the Ninth Circuit consistently had held that "To be material under *Brady*, undisclosed information or evidence acquired through that information must be admissible." *United States v. Kennedy*, 890 F.2d 1056, 1059 (9th Cir. 1989), *cert.*

denied, 494 U.S. 1008 (1990)[3]. *See also United States v. Arias Villanueva*, 998 F.2d 1491, 1506 (9th Cir. 1993) (no *Brady* violation where the undisclosed information is "blatant hearsay that would have been inadmissible at trial"); *United States v. Phillip*, 948 F.2d 241, 250 (6th Cir. 1991) (videotape was not *Brady* material because it was inadmissible hearsay and would not lead to admissible evidence); *United States v. Oliver*, 908 F.2d 260, 262 (8th Cir. 1990) (information requested must lead to the admission of "otherwise undiscoverable" evidence); *United States v. Derr*, 990 F.2d 1330, 1335 (D.C. Cir. 1993) (no *Brady* claim because the "evidence" was inadmissible hearsay and would not have led to admissible evidence).

None but the Ninth Circuit, however, have held that information violates *Brady* when it neither is admissible nor will lead to admissible evidence. Besides *Brady* itself, one Circuit's decision directly conflicts with the Ninth Circuit's holding. In *United States v. Bencs*, 28 F.3d 555 (6th Cir. 1994), Bencs

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[3] *In Bartholomew*, the Ninth Circuit cites *Kennedy* but ignores its limitation to admissible evidence. 34 F.3d at 875. Thus, until the Ninth Circuit's decision in *Bartholomew*, state and federal prosecutors were under no constitutional obligation to disclose clearly inadmissible information, such as polygraph results. Under *Teague v. Lane*, 489 U.S. 288, 301 (1989), a habeas corpus case cannot announce a "new rule" of criminal procedure unless the new rule falls within one of two narrow exceptions. *Id.* at 310-313. The new rule announced in *Bartholomew* is particularly egregious, because the prosecutor testified that he did not disclose the polygraph because it was not admissible in evidence, and the Washington Supreme Court affirmed the conviction for the same reason. This is exactly the detriment that *Teague* prohibits.

claimed that his trial preparation was hindered because *Brady* evidence had been disclosed during trial. Relying on *United States v. Agurs, supra,* which held that suppression of information does not violate *Brady* if its only effect is on trial preparation, the court held that Bencs had not stated a valid claim. 28 F.3d at 561.

Brady is effective precisely because it is limited to admissible "evidence" that is "favorable" to the defense. Because its criteria are objective, *Brady* provides a reliable, predictable standard for prosecutors and the courts to determine whether certain information must be disclosed to the defense. The Ninth Circuit has abandoned *Brady*'s objective standard and, as the next sections will show, its decision both encourages speculation on harm to the defense, and imposes a constitutional discovery rule on prosecutors. This Court should grant certiorari to resolve the confusion among the Circuit Courts, and reaffirm *Brady* as a workable, objective standard.

C. This Court Should Grant Certiorari Because the Ninth Circuit's Decision Reduces the Defendant's Burden of Proof to Mere Speculation.

The Ninth Circuit's extension of *Brady* to information that may affect the preparation or presentation of the defense reduces the defendant's burden of proving harm to a mere speculation. This result is shown in the *Bartholomew* decision itself, where the Court patently speculated as to the possibility that Bartholomew could have improved the preparation or presentation of his defense.

On review of *Brady* claims, the defendant bears the burden of establishing that the withheld information contains "material evidence." *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 n. 15; *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982). Evidence is "material" only if a reasonable probability exists that, had it been disclosed, the result of the trial would have been different. *United States v. Bagley, supra*[4]. A "possibility" of a different result is insufficient: "The mere possibility that an item of undisclosed information might have helped the defense . . . does not establish "materiality" in the

[4] Again, this Court's pending decision in *Kyles v. Whitley*, No. 93-7927, will address the petitioner's burden of proving the materiality of suppressed evidence.

constitutional sense." *United States v. Agurs*, 427 U.S. at 109-110; quoted by *Pennsylvania v. Ritchie*, 480 U.S. at 58 n. 15[5].

Bartholomew claimed that his counsel, armed with the polygraph result, could have taken Rodney's deposition and that the deposition may have uncovered evidence that could have led to a better cross-examination. At the evidentiary hearing, however, Bartholomew's counsel was armed with the polygraph result, and questioned Rodney about it. Despite his knowledge of the polygraph, the entire transcript of Rodney Bartholomew's testimony spans only five pages. Appendix C. Bartholomew's counsel failed to develop one additional piece of evidence favorable to the defense. He failed even to identify one additional question that could have been helpful on cross-examination. To the contrary, Rodney testified, once again, that his trial testimony had been truthful[6].

Despite the lack of any evidence of prejudice, the Court of Appeals nonetheless concluded that Bartholomew had shown that the suppressed polygraph had an adverse effect on the

[5] Similarly, habeas relief may not be granted if there is merely a "reasonable possibility" that trial error contributed to the verdict. *Brecht v. Abrahamson*, ___ U.S. ___, ___, 113 S. Ct. 1710, 1721, 123 L. Ed. 2d 353 (1993). In *O'Neal v. McAninch*, No. 93-7407, this Court will decide whether a habeas petitioner bears the burden of proving that a trial error prejudiced the defense.

[6] Again, Bartholomew's trial attorney testified that he was aware that Rodney may have been lying, and that the polygraph would not have changed his cross-examination of Rodney Bartholomew.

"preparation or presentation" of the defense. The Court then concluded that this possibility created a "reasonable probability" that the result of the trial would have been different. The Ninth Circuit's decision was entirely speculative and must be reversed[7].

In *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982), the Court expressly rejected a similar attempt by the Ninth Circuit to speculate as to the effect a prosecutor's decision had on the defense. 458 U.S. at 862-863, and n. 4. The prosecutor had deported a witness to a crime. The defense claimed that the witness might have provided exculpatory testimony, but did not prove what the witness would have said if he had been called. Despite this lack of proof, the Ninth Circuit held that deporting the witness violated due process because the witness had a "conceivable benefit" to the defense. This Court held that the Ninth Circuit's test was far too speculative, because it eliminated the defendant's burden of

[7] When *Brady* is limited to evidence that is admissible at trial, the courts need not speculate about the harm to the defense. If the petitioner identifies withheld evidence, the reviewing court may gauge whether the new evidence creates a "reasonable probability" that the jury would have reached a different verdict, by weighing the new evidence against the evidence at trial. By comparison, when withheld information -- such as the polygraph in this case -- is not admissible, the court cannot directly gauge the effect the information may have had on the trial. Although the suppression may have affected the preparation and presentation of the defense, the defendant cannot show an effect on the result of trial unless he or she also proves that some new evidence could have been presented to the jury. Thus, the Ninth Circuit's decision inevitably encourages speculation.

proving harm. The Ninth Circuit's decision in *Bartholomew* commits the same error, using different language.

The other Circuit Courts of Appeals, unlike the Ninth Circuit, refuse to grant relief on speculation. *United States v. Ramos*, 27 F.3d 65, 71 (3rd Cir. 1994), thought it "unwise to infer the existence of *Brady* material on speculation alone." The Sixth and Seventh Circuits also hold that "A due process standard which is satisfied by mere speculation would convert *Brady* into a discovery device and impose an undue burden on the district court." *United States v. Driscoll*, 970 F.2d 1472, 1482 (6th Cir. 1992); *United States v. Jackson*, 780 F.2d 1305, 1313 (7th Cir. 1986). In *United States v. Pedraza*, 27 F.3d 1515, 1527 (10th Cir. 1994), the Court rejected the defendants' *Brady* claims because they provided no evidence to support their assertion that withheld tapes would have furthered their defense[8].

[8] A petitioner that claims ineffective assistance of counsel also must prove that there was a "reasonable probability" that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Cuyler v. Sullivan*, 466 U.S. 335, 350 (1980). To show prejudice, speculation is not enough. A petitioner must prove specific instances in which counsel's failures affected his trial. *Scarpa v. Dubois*, 38 F.3d 1, 11-16 (1st Cir. 1994); *United States v. Zillges*, 978 F.2d 369, 373 (7th Cir. 1992); *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985); *Cuevas v. Henderson*, 801 F.2d 586 (2nd Cir. 1986), *cert. denied*, 480 U.S. 908 (1987); *United States v. Asubonteng*, 895 F.2d 424, 429 (7th Cir. 1990), *cert. denied, sub nom. Rivers v. United States*, 494 U.S. 1089 (1990).

Bartholomew introduced no proof whatever that the failure to disclose the polygraph affected his trial. The Ninth Circuit's ruling effectively eliminates the burden of proving prejudice from the defendant, contrary to the decisions of this Court and all other Circuits. The Court should grant the petition for certiorari to establish the proper standard for review of *Brady* claims.

D. The Ninth Circuit's Decision Effectively Imposes a Constitutional Discovery Rule on Prosecutors.

United States v. Bagley, *supra*, emphasized that not every suppression of information causes such a miscarriage of justice: "a rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the finality of judgments." 473 U.S. at 675 n. 7. Similarly, *Arizona v. Youngblood*, 488 U.S. 51 (1988) reviewed "what might loosely be called the area of constitutionally guaranteed access to evidence" and emphasized that the Court had consistently "rejected the notion that a 'prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel.'" *Id.* at 55. *See also United States v. Agurs*, 427 U.S. at 106, 111. As these cases show, *Brady* did not create a constitutional discovery rule.

The Ninth Circuit's decision in *Bartholomew*, however, effectively requires the prosecution to disclose all information in its possession to the defense. If the test is whether the withheld information had an effect on the preparation or presentation of the defense, the prosecution can gauge its obligation to disclose only if it fully understands the defense case. Under the adversary system of justice, however, the prosecution's ability to discover the defense case is limited -- and an overly intrusive attempt to do so can itself violate due process. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). Even if the prosecutor investigates the possible defense strategies, *Bartholomew* invites reviewing courts to second-guess the prosecutors, and speculate whether the nondisclosed information would have affected the defense in some fashion. To avoid reversal, therefore, the prosecution will effectively be required to release all information to the defense. This is directly contrary to the command of this Court in *United States v. Bagley*, *supra*, and *Pennsylvania v. Ritchie*, 480 U.S. at 59. This Court should grant certiorari to reaffirm that *Brady* does not impose a constitutional discovery rule.

VI. CONCLUSION

The Ninth Circuit's decision in *Bartholomew* conflicts with *Brady*, and carries *Brady*'s obligation to disclose farther than all other circuits. Its decision will lead directly to

speculation regarding harm to the defense, and will create a constitutional discovery rule. Both results are directly contrary to commands from this Court. The Court should grant certiorari to review, and reverse, the decision of the Ninth Circuit.

RESPECTFULLY SUBMITTED

CHRISTINE O. GREGOIRE
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THORNTON WILSON
Assistant Attorney General
Counsel of Record

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-35549
D.C. No. CV 91-5102-RJB

OPINION

DWAYNE EARL BARTHOLOMEW,

Petitioner-Appellant,

v.

TANA WOOD, Superintendent of the Washington State Penitentiary,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Washington
Robert J. Bryan, District Judge, Presiding

Argued and Submitted
April 8, 1994--Seattle, Washington

Filed September 6, 1994

Before: Eugene A. Wright, Thomas Tang, and
Stephen Reinhardt, Circuit Judges.

Opinion by Judge Reinhardt

SUMMARY

Criminal Law and Procedure/Due Process

The court of appeals reversed a district court order denying a petition for writ of habeas corpus, remanding with instructions. The court held that prosecutors violated due process by failing to disclose in advance of trial that a witness who gave crucial testimony on a key issue had previously taken, and failed, a polygraph test.

Appellant Dwayne Bartholomew robbed a laundromat. During the course of the robbery, he shot and killed the attendant. A critical issue at trial in state (Washington) court was whether the killing was premeditated. The crucial witnesses against Bartholomew were his brother, Rodney Bartholomew, and Rodney's girlfriend, Tracy Dormady. Rodney and Tracy testified that Dwayne had told them he intended to rob the laundromat and leave no witnesses. Dwayne's defense was that Rodney had been involved in the robbery and that Rodney and Tracy were lying to protect themselves.

Dwayne was convicted and sentenced to death. Later, he discovered that Rodney had taken a polygraph test and had given what appeared to be untruthful answers to questions regarding whether he had helped Dwayne rob the laundromat

and whether he and Dwayne had been together inside the laundromat on the night of the robbery. During trial the prosecution had failed to disclose the testing; the prosecution later conceded that tests had been administered and that the state had suppressed the results.

Following U.S. Supreme Court review, The Washington Supreme Court remanded for retrial of the penalty phase under a narrowed construction of the death penalty statute. The defense offered the results of Rodney's polygraph test and also challenged other items of evidence. This time, the jury returned a verdict of life imprisonment without parole, the more lenient of the two sentences it could impose.

Dwayne Bartholomew petitioned to the district court for habeas relief, contending that the state violated due process by failing to disclose the test results prior to trial of the guilt phase and that he received ineffective representation of counsel. The district court denied his petition, holding that he failed to show prejudicial errors by his attorney and failed to show that disclosure of the test results to his attorney would have had a reasonable likelihood of affecting the verdict.

[1] In a case such as this, a defendant need show only that there is a reasonable likelihood that the degree of conviction would have been lower, not necessarily that he would have been exonerated, if the material had been disclosed.

[2] The results of the test were favorable to Bartholomew's defense; they bore directly on the credibility of the most significant witnesses, and [3] they supported his theory of the case.

[4] The state argued that the test results would not have been material if they had been admissible, since there was other evidence tending to show premeditation. This contention is not persuasive, since the results might have served to impeach Tracy Dormady's testimony. [5] Further, Rodney and Tracy's testimony was the only direct evidence of premeditation presented by the prosecution at the guilt phase. Failure to disclose material which could impeach, or lead to the impeaching, of that testimony necessarily undermines confidence in the outcome of the trial.

[6] Even if the polygraph results were not admissible, they were material. Failure to disclose the results clearly impaired Bartholomew's ability to prepare and present his case. [7] Had his attorney known of the test results, he would have had a stronger reason to pursue investigation of Rodney's story. [8] A vigorous examination of Rodney in a pretrial deposition would likely have uncovered a variety of conflicting statements which could have been used quite effectively in cross-examination at trial.

[9] Because the prosecution's disclosure failure undermines confidence in the verdict, due process was denied, and reversal is warranted.

COUNSEL

Timothy K. Ford, MacDonald, Hoague & Bayless, Seattle, Washington, for the petitioner-appellant.

Thornton Wilson, Assistant Attorney General, Olympia, Washington, for the respondent-appellee.

OPINION

REINHARDT, Circuit Judge:

Dwayne Bartholomew, a Washington State prisoner, was convicted of aggravated first degree murder. Although he was originally sentenced to death, the Washington Supreme Court reversed his sentence, and after a sentencing retrial he received a sentence of life without possibility of parole. Upon exhausting his remedies in the state courts, he brought this habeas corpus petition, which the district court denied. On appeal, Bartholomew claims that the state violated due process by failing to disclose that its crucial witness on the issue of premeditation had failed a polygraph test. He contends that, if the prosecution had disclosed the information, he would likely have been

convicted of simple rather than aggravated first-degree murder. Had Bartholomew been convicted of the lesser murder charge, he would, at an elderly age, become eligible for parole. Instead, because of the degree of his conviction, he is ineligible for release from prison at any time during his lifetime.

Because the state has admitted that it did not disclose the adverse results of the polygraph test administered to its key witness, and because that failure undermines confidence in Bartholomew's conviction of the aggravated offense, we reverse and order the district court to issue a writ directing the state either to grant Bartholomew a new trial on the question of premeditation or to reduce the degree of the conviction to simple first degree murder.

I.

On August 1, 1981, Dwayne Bartholomew robbed a Tacoma laundromat. During the course of the robbery, he fired two shots with a .22 caliber pistol. One bullet struck and killed the attendant, while the other was found lodged in a counter near the body. Bartholomew confessed to committing the robbery and to firing the fatal shot. He has never challenged the voluntariness or validity of this confession. At trial and on this appeal of the denial of his habeas petition, Bartholomew's claims have revolved around a single, narrow issue: whether he had the requisite mens rea to be convicted of aggravated first degree

murder under Washington law (which requires premeditation), or whether he could only have been convicted of simple first degree murder (for which a felony-murder theory is sufficient).[1] Bartholomew asserts that he did not have the premeditated intent to kill the laundromat attendant.

The crucial witnesses against Dwayne Bartholomew were Dwayne's brother Rodney and Rodney's girlfriend, Tracy Dormady (who was pregnant with Rodney's child at the time Dwayne committed the crime). Rodney and Tracy's testimony provided the only direct evidence that Dwayne had the premeditated intent to kill: they testified that he had told them he intended to rob the laundromat and leave no witnesses. Dwayne Bartholomew's defense centered on the assertion that Rodney had been involved in the robbery and that Rodney and Tracy were lying, out of self-interest, about the part of their testimony upon which the state relied to establish Dwayne's premeditation.

After the trial at which he was convicted and sentenced to death, Dwayne discovered that, at the request of the prosecution, Rodney and Tracy had submitted to polygraph examinations. The results of Tracy's test were inconclusive, but Rodney's suggested that he was untruthful when he gave negative

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[1]Under Washington law, aggravated first degree murder is punished by death or by life imprisonment without possibility of parole. First degree murder is punished by life imprisonment *with* the possibility of parole.

answers to the two relevant questions: whether he in any way helped Dwayne to rob the laundromat, and whether he and Dwayne had at any point been inside the establishment at the same time on the night of the robbery. Although the state's attorney has asserted throughout the entire course of these proceedings that the prosecution maintained an open-file discovery policy, the existence of these examinations, and their results, had not been disclosed to the defense. Indeed, the prosecution initially denied that any tests took place.[2] However, it eventually conceded that the tests had indeed been administered and that the state had suppressed the results.

Dwayne Bartholomew moved for a new trial, in part on the basis of the newly-discovered polygraph results, but the trial court denied the motion. On appeal, the Washington Supreme Court affirmed Bartholomew's conviction. *See State v. Bartholomew (Bartholomew I)*, 654 P.2d 1170 (Wash. 1982). It rejected his claim that the state violated due process by failing to disclose Rodney's polygraph results. Although the court affirmed Bartholomew's conviction of aggravated first-degree

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[2]When Dwayne Bartholomew's new counsel first moved for a new trial, the prosecutor stated:

> I can give an answer right now. There weren't any polygraphs and there wasn't any deal; so, so much for that.

(Trail Tr. 620).

murder, it reversed his death sentence because it held that the Washington death penalty statute was unconstitutional as applied. It adopted a narrowing construction of the statute and remanded for a retrial of the penalty phase under the narrowed construction. The state sought review of this decision in the U.S. Supreme Court, which vacated the Washington Supreme Court's decision and remanded for reconsideration in light of *Zant v. Stephens*, 462 U.S. 862 (1983). *See Washington v. Bartholomew*, 463 U.S. 1203 (1983). On remand, the Washington Supreme Court adhered to its earlier decision and remanded for a penalty retrial. *See State v. Bartholomew (Bartholomew II)*, 683 P.2d 1079 (Wash. 1984). The Washington Supreme Court held that the polygraph results would be admissible on remand. *See id.* at 1088-89.

After the decision in *Bartholomew II*, the county prosecutor determined that the evidence did not support a sentence of death under the narrowing construction adopted by the state Supreme Court. The prosecution and defense filed a joint motion for a sentence of life imprisonment without parole. Because the trail judge doubted that the prosecutor could decline to seek the death penalty at so late a stage of the proceedings, he appointed special counsel to argue that the state lacked discretion to do so. After hearing argument from both parties and the special counsel, the trail court denied the joint motion and

ordered that a new sentencing hearing take place. The prosecution and defense appealed. In a six-to-three decision, the Washington Supreme Court held that "[t]he prosecution has no right, statutory or constitutional, to usurp the jury's functions to determine *mitigation* in this case, and make the decision whether the defendant should live or die." *State v. Bartholomew (Bartholomew III)*, 710 P.2d 196, 200 (Wash. 1985) (emphasis in original). Thus, the court remanded "with instructions that the prosecutor present this case to a sentencing jury for trial of the penalty phase of this case." *Id.*

The penalty retrial occurred in the fall of 1986. The defense offered the results of Rodney Bartholomew's polygraph test. It also challenged several other items of evidence that had been introduced at the original penalty trial. The jury returned a verdict of life imprisonment without parole, the more lenient of the two sentences it was free to impose.

After exhausting his state remedies, Bartholomew filed this federal habeas petition in the District Court for the Western District of Washington in 1991. Among other claims, the petitioner alleged that the state had violated due process by failing to disclose the polygraph results to the defense prior to trial of the guilt phase and that Bartholomew's trail counsel had been ineffective because he failed to discover that the polygraph tests had been conducted and he failed to undertake a sufficient

investigation of the operation of the gun used in the robbery. After an evidentiary hearing, the district court denied the petition. It held that Bartholomew had failed to show that any errors on the part of his attorney prejudiced his defense. It also held that he had failed "to show that disclosure of the results of the polygraph to defense counsel would have had a reasonable likelihood of affecting the verdict." The district court granted a certificate of probable cause, and Bartholomew filed this appeal.

II.

Bartholomew contends that the state violated the Due Process Clause when it failed to disclose that Rodney Bartholomew had failed the lie detector test. *See Brady v. Maryland*, 373 U.S. 83 (1963). The state concedes that it failed to disclose the test or its results, and there is little doubt that the results of the test were favorable to Dwayne Bartholomew. However, the state argues that the polygraph results were not material to the question of the degree of Bartholomew's guilt because polygraph results are generally inadmissible under Washington law, and because Rodney and Tracy's testimony was not the only evidence tending to show premeditation. We reject these arguments. Having reviewed the state court record, we conclude that there was a reasonable probability that Bartholomew would have been convicted of simple instead of

aggravated first degree murder if the polygraph results had been disclosed.[3]

[1] In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. By its terms, *Brady's* holding was limited to cases in which the defendant made a request for the suppressed evidence. However, the Supreme Court made clear in *United States v. Agurs*, 427 U.S. 97 (1976), that the failure to disclose material and favorable evidence will violate due process even when the defendant makes no request for the material. Subsequently, in *United States v. Bagley*, 473 U.S. 667 (1985), the Court explained the meaning of the term "material." "[E]vidence is material," the Court said, "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* at 682 (plurality opinion); *accord id.* at 685 (White, J., concurring). As *Bagley* makes clear, a defendant need only demonstrate a reasonable probability that "the result of the proceeding would

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[3]Because we conclude that the writ must issue on the basis of the *Brady* violation, we need not reach Bartholomew's other claims.

have been *different*." To satisfy this standard, a defendant will not always have to show a reasonable probability that he would have been exonerated if the material had been disclosed. In a case such as the present one, it is sufficient to establish a reasonable likelihood that the *degree of conviction* would have been lower. *Cf. Hill v. Lockhart*, 474 U.S. 52, 59 (1985)(holding, in context of ineffective assistance challenge to a guilty plea, that a defendant need only show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial").

[2] There is little doubt that the results of Rodney Bartholomew's polygraph test were favorable to the defense of Dwayne Bartholomew. If they were admissible, the information would clearly have been of substantial import. In *United States v. Brumel-Alvarez*, 991 F.2d 1452 (9th Cir. 1993), we explained that "*Brady* information includes 'material . . . that bears on the credibility of a significant witness in the case.'" *Id.* at 1461 (quoting *United States v. Strifler*, 851 F.2d 1197, 1201 (9th Cir. 1988), *cert. denied*, 489 U.S. 1032 (1989))(ellipsis in *Brumel-Alvarez*). The polygraph results bore directly on the credibility of the most significant witnesses in the case, Rodney Bartholomew and Tracy Dormady. Rodney and Tracy provided the only direct evidence of premeditation -- they stated that Dwayne announced that he intended to leave no witnesses to the

robbery. Any facts that would provide a basis to impeach this statement were clearly favorable to Dwayne's defense.

[3] Moreover, the polygraph results directly supported Dwayne's theory of the case: he claimed that Rodney had participated in the crime and was lying to protect himself, and that Tracy was lying to protect Rodney, the father of her child. Dwayne's attorney vigorously argued this theory to the jury, but he had no support for it other than Dwayne's obviously self-serving statement. Had Dwayne been able to introduce evidence of the polygraph tests, or even to use the results as a basis for further investigation, his attack on Rodney and Tracy's credibility would likely have been demonstrably stronger.

[4] The state argues, however, that the polygraph results would not have been material even if they had been admissible, because Rodney's testimony was not the only evidence tending to show premeditation. We find this contention unpersuasive. The state first notes that at trial it offered the testimony of Tracy Dormady and of Stanley Bell, both of whom related statements of Dwayne's that indicated that he had intentionally shot the attendant. However, as explained above, the polygraph results would have served to impeach Tracy's testimony just as they would have Rodney's -- if he had a motive to lie to protect himself, she had a motive to lie to protect him as well. As to Bell, he testified only at the *penalty* phase; his testimony could

not have influenced the finding regarding premeditation made by the jury at the guilt phase, and that is the only finding regarding premeditation that occurred in this case.

[5] The state also notes that it introduced evidence regarding the single-action design of the gun. At trial, the state argued that two volitional acts were necessary to cock and fire the gun. However, Dwayne's attorney presented a plausible theory that the gun went off accidentally. As a result, the significance of the gun design evidence was disputed. In any event, that evidence was not so persuasive that we can say that Rodney and Tracy's testimony was unimportant to the jury's decision. Their testimony constituted the *only direct* evidence of premeditation presented by the state at the guilt phase of the trial. The failure to disclose material which would have impeached Rodney and Tracy's credibility (or which would likely have led to evidence impeaching their credibility) necessarily undermines confidence in the outcome of the trial, even if circumstantial inferences from the design of the murder weapon would have been sufficient to support the verdict. The test is not whether there is sufficient other evidence to support a verdict, but whether we can be confident that the jury would have returned the same verdict had the *Brady* violation not occurred. *See Lindsey v. King*, 769 F.2d 1034, 1042-43 (5th Cir. 1985)(holding that the failure to disclose evidence

impeaching one of the two eyewitnesses caused sufficient prejudice to undermine confidence in the outcome, even though the other witness's testimony supported the verdict by itself).

[6] The district court appears to have assumed that the polygraph results would have been material if they had been admissible.[4] The judge appears to have rested his denial of Bartholomew's petition on the state's argument that the polygraph results were not admissible under Washington law, and thus that they did not satisfy *Brady's* materiality requirement.[5] As the district court noted, the Washington state courts have held that polygraph results are generally inadmissible even for impeachment purposes absent a stipulation of the parties. *See, e.g., State v. Ellison*, 676 P.2d 531, 535 (Wash.

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[4]In a very similar case, the Third Circuit held that the failure to disclose the oral reports of a polygraph examiner created a reasonable likelihood that the outcome of the proceeding would have been different, where these reports cast doubt on the credibility of a key prosecution witness. *See Carter v. Rafferty*, 826 F.2d 1299, 1309 (3d Cir. 1987), *cert. denied*, 484 U.S. 1011 (1988).

[5]The district court stated:

> The petitioner also presents persuasive argument and evidence that the prosecutor should have advised defense counsel of the results of the witnesses' polygraph tests. Petitioner fails, however, to show that *evidence* was withheld. *The information withheld only possibly could have led to some admissible evidence.* He fails to show that disclosure of the results of the polygraph to defense counsel would have had a reasonable likelihood of affecting the verdict.

(emphasis in original).

Ct. App.), *review denied*, 101 Wash.2d 1010 (1984). We need not, however, determine whether Dwayne Bartholomew could have introduced the polygraph results, for we conclude that the non-disclosed polygraph test satisfied *Brady's* materiality requirement whether or not it was admissible. In *United States v. Kennedy*, 890 F.2d 1056 (9th Cir. 1989), *cert. denied*, 494 U.S. 1008 (1990), we stated that "[t]o be material under *Brady*, undisclosed information *or evidence acquired through that information* must be admissible." *Id.* at 1059 (emphasis added). The *Kennedy* court noted that "in determining the materiality of undisclosed information, a reviewing court may consider 'any adverse effect that the prosecutor's failure to respond might have had *on the preparation or presentation* of the defendant's case.'" *Id.* (quoting *Bagley*, 473 U.S. at 683)(emphasis added). The failure to disclose the polygraph results clearly impaired Dwayne Bartholomew's ability to prepare and present his case. Under all of the circumstances, that impairment was sufficient to undermine confidence in the outcome.

[7] Dwayne Bartholomew's trial attorney conducted a minimal investigation of Rodney's credibility, doubtless because there appeared to be no evidence to corroborate Dwayne's account of Rodney's participation in the crime. Had counsel known of the polygraph results, he would have had a stronger reason to pursue an investigation of Rodney's story. He likely

would have attempted to interview Rodney and Tracy before trial. He likely would have taken Rodney's deposition and probably Tracy's, as he was entitled to do under the state criminal rules. *See* Wash. Super. Ct. Crim. R. 4.6(a); Habeas Tr. 67.

[8] At a deposition, Dwayne's counsel could have asked Rodney about the polygraph results and might well have succeeded in obtaining an admission that he was lying about his participation in the crime and about his brother's actions on the night in question. Such an acknowledgment would have been admissible to impeach Rodney if Rodney gave inconsistent testimony at trial. Even if counsel did not succeed in provoking so damaging a response, any thorough questioning at the time of deposition would likely have elicited a variety of less crucial statements inconsistent with Rodney's trial testimony. Indeed, after the trial was over and Dwayne discovered the polygraph test, Rodney related at least two contradictory accounts regarding the number of times he sat for the polygraph examination. Immediately after the first trial, Rodney told one of Dwayne's attorneys that "[h]e was told there was a problem with the results on two questions and asked to come back for additional examination. Rodney indicated that he did not return for any additional examination." Tufts Affidavit at 1. In the district court, however, Rodney stated that he *did* come back for a

second test, and that he was under the influence of drugs at the time of the first test. *See* Habeas Tr. 86. These inconsistencies demonstrate that a vigorous examination of Rodney Bartholomew in a pretrial deposition would likely have uncovered a variety of conflicting statements which could have been used quite effectively in cross-examination at trial. In a close case such as this, the *Brady* violation could well have made the difference.

III.

[9] Given the closeness of the issue of premeditation, the likelihood that disclosure of the polygraph results would have led to other admissible evidence undermining Rodney Bartholomew's and Tracy Dormady's credibility creates a reasonable probability that the jury would have convicted Dwayne Bartholomew of simple rather than aggravated first degree murder had the state disclosed those results. Because the prosecution's failure to disclose that information undermines confidence in the verdict, we conclude that the state violated the Due Process Clause. Accordingly, we reverse.[6] The district court is instructed to issue an alternative writ ordering the state to afford Bartholomew a new trial on the issue of premeditation within a reasonable

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[6]Because we have concluded that the polygraph results were "material" – that is, that their suppression caused prejudice to the defense – it necessarily follows that the prosecution's failure to disclose this information "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1722 (1993)(quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

period of time or to reduce his degree of conviction to simple first degree murder.

REVERSED.

[FILED]
[April 12, 1993]

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CASE NO. C91-5102B

FINDINGS OF FACT AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

DWAYNE EARL BARTHOLOMEW,

Petitioner,

v.

JAMES BLODGETT,

Respondent.

Petitioner Dwayne Earl Bartholomew was convicted of aggravated first degree murder and sentenced to death. On Appeal, Mr. Bartholomew's sentence was reduced to life without parole. *State v. Bartholomew*, 98 Wash. 2d 173 (1982). He now petitions this court for a writ of habeas corpus alleging that his constitutional rights were violated in the state courts.

The court has considered the records and files herein and has read the transcript of Mr. Bartholomew's trial and sentencing. The court conducted an evidentiary hearing and

heard the argument of counsel, and has considered post-hearing memoranda. The court is fully advised.

PROCEDURAL BACKGROUND

In his original petition, Mr. Bartholomew presented 17 issues. Thirteen of those issues claim, in different ways, that Mr. Bartholomew did not receive the reasonably effective assistance of counsel. Therefore, Petitioner claims a violation of the Sixth Amendment to the United States Constitution. Two of Mr. Bartholomew's claims allege that he was denied due process of law under the Fifth Amendment, because (1) the prosecutor failed to inform the defense of results of polygraphs taken by prosecution witnesses, and (2) the prosecutor should not have used the testimony of those witnesses without disclosure of the results of the polygraphs. The polygraph tests indicated some deception on the part of a key prosecution witness.

Other issues raised by Mr. Bartholomew in his Petition for Writ of Habeas Corpus were abandoned before hearing.

BASIC LAW

In a habeas corpus proceedings, the federal courts can intervene in the state judicial process only to correct errors of constitutional magnitude. *See generally, Engle v. Isaac*, 457 U.S. 1141 (1983). The petitioner has the following burden of proof:

> To be cognizable under section 2254, an error must be 'a fundamental defect which inherently results in a complete miscarriage of justice,' and it must present 'exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.

Carlson v. Hong, 707 F.2d 367, 368 (9th Cir. 1983)(citations omitted).

INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment standard for effective assistance of counsel at trial has been established on numerous occasions by the U.S. Supreme Court. Generally, a defendant's right has been violated when "counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986). A two prong test tests a claim of ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" as guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, whose result is unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). Counsel's performance must be evaluated on the record as it existed at the

time of the performance, so that judicial scrutiny is not distorted by effects of hindsight. Id. at 689.

Petitioner presents convincing evidence and arguments that his attorney fell below the standards of criminal defense attorneys in like situations, particularly in the preparation for trial and sentencing. Petitioner fails, however, in his attempt to show that this attorney's performance prejudiced him, denied him a fair trial, or upset the adversarial balance. The result of the trial is reliable.

FAILURE TO INFORM DEFENSE; USE OF WITNESSES

"The proper role of the criminal prosecutor is not simply to obtain a conviction, but to obtain a fair conviction." *Brady v. Maryland*, 373 U.S. 83, 87 (1963)(emphasis in original). Generally, a failure to disclose exculpatory material "requires three findings: (1) that evidence was suppressed; (2) that this evidence was favorable to the accused; and (3) that the evidence was material either to guilt or punishment." *Smith v. Black*, 904 F.2d 950 (5th Cir. 1990)(citations omitted).

> The prejudice to a defendant's right to a fair trial is even more palpable when the prosecutor has not only withheld exculpatory evidence, but has knowingly introduced and argued false evidence. ... [A] prosecutor's presentation of tainted evidence is viewed seriously and its effects are exceedingly carefully scrutinized. A new trial is required 'if there is any reasonable likelihood that the false [evidence] could have affected the judgment of the jury.'

Brown v. Borg, 951 F.2d 1011, 1015 (9th Cir. 1991)(citations omitted). The petitioner also presents persuasive argument and evidence that the prosecutor should have advised defense counsel of the results of the witnesses' polygraph tests. Petitioner fails, however, to show that evidence was withheld. The information withheld only possibly could have led to some admissible evidence. He fails to show that disclosure of the results of the polygraph to defense counsel would have had a reasonable likelihood of affecting the verdict.

CONCLUSION

Petitioner fails to show that the results of his proceedings were effected by these lapses. The most that is shown is that it is possible that the results would have been different, had defense counsel done more, or had the prosecutor timely advised defense counsel of the polygraph results. Such speculation cannot be the basis of a finding of "a fundamental defect which inherently results in a complete miscarriage of justice." The petition must be denied.

Now, therefore, it is hereby

ORDERED that Dwayne Earl Bartholomew's Petition for Writ of Habeas Corpus is **DENIED**.

The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of record and to any party appearing pro se at said party's last known address

DATED this 12th day of April, 1993.

/s/
Robert J. Bryan
United States District Judge

[Filed]
[January 13, 1993]

APPENDIX C

From Transcript of Trial (on Evidentiary Hearing) before the Honorable Robert J. Bryan, United States District Judge, Docket No. C91-5102B, December 22, 1992, 1:51 p.m., beginning on page 84, reported by Julaine V. Ryen.

RODNEY BARTHOLOMEW, PLAINTIFF'S WITNESS, SWORN OR AFFIRMED.

DIRECT EXAMINATION

BY MR. FORD:

Q. Would you state your name and spell it for the court reporter, please.

A. Rodney Leroy Bartholomew.

Q. And are you related to Dwayne Bartholomew?

A. Yes. Brother.

Q. You were present on the night in July 1981 – I think it was August 1st, 1981 – when Paul Edward Turner was killed, isn't that right?

A. I was at the laundromat, yes.

Q. And you saw Dwayne that night, is that right?

A. Yes. In a parking lot.

Q. And you and Dwayne had committed robberies together prior to that occasion, had you not?

A. When I was living at my dad's and I was about 15.

Q. And Dwayne talked to you about the robbery prior to the commission of it, isn't that right?

A. Yes.

Q. And you testified at trial about his discussions with you in the car prior to the robbery, isn't that right?

A. Yes.

Q. Prior to testifying in the trial, you were given a polygraph examination?

A. Several.

Q. And were you told what the results of those polygraph examinations were?

A. No, sir.

Q. Do you remember who it was that gave you the polygraph examination?

A. No, sir.

Q. Did he tell you that when you answered that you had not assisted Dwayne with the robbery that the polygraph indicated that you were not telling the truth?

A. No, sir; not to my knowledge.

THE COURT: Pull that mike down a little bit, would you, Mr. Bartholomew.

Thank you.

Q. (By Mr. Ford) Do you remember him asking you whether you had helped Dwayne in the robbery?

A. I don't remember the questioning, sir.

Q. Did you know that when he asked you whether or not you and Dwayne had been in the laundromat together and you said you had not been in the laundromat with Dwayne that the polygraph indicated you were not telling the truth?

A. No, sir. This is twelve years ago. I tried to put a lot of this stuff behind me. It was pretty tenseful back then.

Q. Do you remember being asked by the polygraph examiner to return and have another test done after the one that you were first given?

A. Yes, I do. There is a reason for it, sir.

Q. And did you go back?

A. Yes, sir.

Q. You went back for a second polygraph examination?

A. Yes, sir.

Q. And when was that, do you recall?

A. No, I don't, sir. I was under the influence of drugs, is why he wanted to recast me again.

Q. And you told him that at the time?

A. Yes, I did. He asked me if I had taken any drugs or drank the last 24 hours. I said, yes, I have.

Q. And did he administer the test to you that day?

A. Yes, he did it anyway. Then he rescheduled another one, to my knowledge.

Q. And then you came back a second time, is your recollection?

A. Yes, sir.

Q. And it was the same tester?

A. I believe so. To my knowledge.

Q. And then at the end of that test, did he tell you what the results were?

A. No, sir. I don't recall anybody telling me what the results were.

Q. And did he ask you at the end of that second test to come back another time?

A. Sir, I don't remember exactly.

Q. Did you ever consult a lawyer with regard to the possibility that you could be charged in this homicide?

A. No reason to, sir.

Q. So when the police officers were questioning you, they did not tell you that you had failed a polygraph examination?

A. Nobody ever told me I failed a polygraph.

Q. To this day?

A. To this day.

Q. Did you ever speak with Dwayne's lawyer prior to the trial?

A. Never.

Q. Did you ever see him prior to the trial?

A. No, not that I can remember. It's twelve years ago.

Q. But you know you never talk to him before the trial?

A. As far as I know, I did not, sir.

MR. FORD: That's all the questions I have. Thank you.

CROSS-EXAMINATION

BY MR. WEISSER:

Q. Mr. Bartholomew, do you remember testifying at your brother's trial in 1981?

A. Yes, I do.

Q. And at that time, do you recall being sworn to tell the truth, the whole truth, and nothing but the truth, or words to that effect?

A. Yes, sir.

Q. Did you lie under oath on that day?

A. No, I did not, sir.

Q. Did you tell the truth at your brother's trial?

A. Yes, sir.

MR. WEISSER: Thank you.

THE COURT: Anything further?

MR. FORD: Nothing further, Your Honor.

THE COURT: Thank you, Mr. Bartholomew. You may be excused.

THE WITNESS: Thank you, sir.

ORIGINAL

(2)

No. 94-1419

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

TANA WOOD, Superintendent,

Petitioner,

v.

DWAYNE EARL BARTHOLOMEW,

Respondent.

BRIEF IN OPPOSITION

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ATTORNEYS FOR RESPONDENT

31 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in holding that, on the facts of this case, there is a reasonable likelihood that disclosure of polygraph results would have led the defense to admissible and favorable evidence sufficient to have changed the result of this criminal trial?

2. Whether the Court of Appeals' judgment is correct for the additional reason that a prosecutor's knowing presentation of a witness who has failed a polygraph examination on central points of his testimony, without disclosing that fact to the defense, the court, or the jury, violates the Due Process Clause of the Fourteenth Amendment?

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TABLE OF AUTHORITIES

CASES

STATUTES

No. 94-1419

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

TANA WOOD, Superintendent,

Petitioner,

v.

DWAYNE EARL BARTHOLOMEW,

Respondent.

BRIEF IN OPPOSITION

Respondent Dwayne Earl Bartholomew respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Court of Appeals' decision in this case.

Pursuant to Rule 15.1, respondent adds the following corrections and supplement to the facts set out in the petition.

JURISDICTION

Respondent does not dispute Petitioner's statement regarding this Court's jurisdiction in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions cited by Respondent, this case involves the following constitutional and statutory provisions:

The Sixth Amendment to the Constitution of the United States, which provides in part:

> In all criminal prosecutions the accused shall enjoy the right ... to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Washington Criminal Rule 4.7(a), which provides, in part,

> (a) **Prosecutor's Obligations.**
> (1) Except as otherwise provided by protective order or as to matters not subject to disclosure, the prosecuting attorney shall disclose to the defendant the following material and information within the prosecuting attorney's possession or control no later than the omnibus hearing:
> (i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witnesses;
> * * *
> (iv) any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and scientific tests, experiments, or comparisons;
> * * *
> (3) Except as is otherwise provided as to protective orders, the prosecuting attorney shall disclose to defendant's counsel any material or information within the prosecuting attorney's knowledge which tends to negate the defendant's guilt as to the offense charged.

COUNTERSTATEMENT OF THE CASE

As the Court of Appeals noted, from the outset of this case "Bartholomew's claims have revolved around a single, narrow issue: whether he had the requisite mens rea to be convicted of aggravated first degree murder under Washington law (which requires premeditation), or whether he could only have been convicted of simple first degree murder (for which a felony-murder theory is sufficient)." Bartholomew v. Wood, 34 F.3d 870, 871 (9th Cir. 1994). The nondisclosed, exculpatory polygraph results went to the credibility and motives to lie of the only direct witnesses who testified on that issue, Rodney Bartholomew and Tracy Dormady.

1. The Proceedings in State Court.

From the day of his arrest, Dwayne Bartholomew has admitted that he robbed the laundromat and shot the attendant, Paul Turner; but he claims the shooting was accidental. Dwayne has been consistent in describing what happened: He says he persuaded his brother Rodney, who was at the laundromat with his girlfriend Tracy Dormady, to help him get into the laundromat so he could rob it. Rodney asked the attendant to unlock the door so that he could use the bathroom. Dwayne followed Rodney into the laundromat and entered the bathroom when Rodney came out. Rodney was gone when Dwayne returned. Dwayne ordered the attendant to lie down on the floor. When Dwayne turned to take the money from the cash register, the gun went off. As he fled,

the gun fired a second time into a counter. Tr. Tr. 385-86, 396, 467-68[1]; see State v. Bartholomew, 98 Wn.2d 173, 177-180, 654 P.2d 1170 (1982), vacated 463 U.S. 1203 (1983), adhered to 101 Wn.2d 631, 683 P.2d 1079 (1984).

Rodney and Tracy were the state's key witnesses on the issue of premeditation. They said that Dwayne told them that he was going to rob the laundromat and leave no witnesses, and they left, frightened. Both denied that Rodney participated in the crime. Tr. Tr. 369, 385-386.

The prosecutor relied extensively on Rodney and Tracy's version of the events in his argument to the jury:

> He [Dwayne] told Rod, his brother, and he told Tracy he was going to rob the laundromat. Their immediate response to him was, "You'll never get away with it. You're crazy; you won't get away with this." What was his response? "I'm not going to leave any witnesses." That can only mean one thing.

Tr. Tr. 505-506.

> Now, his reaction after he is caught is to do his best to get back at Rod; to get back at Tracy; to involve them. But, ladies and gentlemen, it makes no sense that they would be involved in this.

Tr. Tr. 507.

> I submit that what happened here is precisely what Rod and Tracy said, up to the point that this man enters the store. He tells them he is going to rob the place. He tells them he is going to leave no witnesses. They

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[1] The full state trial transcript was made part of the record below. This Brief references testimony and argument at the original trial and sentencing as "Tr. Tr." Testimony at the resentencing hearing--which was only partly transcribed and submitted--is referenced "R. Tr." Testimony in the December 22, 1992 hearing before the District Court is referenced "H. Tr."

don't say anything because they're afraid of him, and obviously with good reason. As they leave, he is headed toward the door.

Tr. Tr. 508-509.

> [Consider] the testimony of Rod that he told him he was crazy, he wouldn't get away with it. The testimony of Rod that the defendant responded, he would leave no witnesses.

Tr. Tr. 523.

> Certainly it took some soul searching [to turn Dwayne in to the police]. Rodney told us he talked to one of his older brothers first. Only after that were the police called. He finally decided, brother or not, he had to come forward.

Tr. Tr. 524.

It was only after his conviction, that Dwayne's new defense counsel learned that Rodney and Tracy had been given polygraph tests at the request of the prosecutor, and that the police polygraph expert determined that Rodney's answers regarding his participation in the crime were deceptive.[2]

On appeal, the Supreme Court of Washington affirmed Dwayne's conviction but reversed the death sentence and remanded for a retrial of the penalty phase. State v. Bartholomew, 98 Wn.2d 173, 654 P.2d 1170 (1982), vacated 463 U.S. 1203 (1983), adhered to 101 Wn.2d 631, 683 P.2d 1079 (1984). The reversal of the death sentence was based, in part, on the failure to disclose the

[2] Dwayne's appointed trial counsel, whom the District Court found failed to adequately investigate the case (Pet. App. B-4), withdrew shortly after the death sentencing verdict was returned.

polygraph results, which the Court held were admissible at sentencing.[3] State v. Bartholomew, 101 Wn.2d at 646.

A new penalty trial was conducted, see State v. Bartholomew, 104 Wn.2d 844, 710 P.2d 196 (1985), which resulted in the sentence of life imprisonment without the possibility of parole--the only alternative to the death sentence available to the jury under Washington law. At the penalty retrial, the defense argued, among other things, that there was doubt about the accuracy of the original verdict of premeditation, because of evidence the first jury had not heard. The most important new evidence was the results of the undisclosed polygraph examinations given to Rodney Bartholomew.[4]

The defense placed these results into evidence through the testimony of the polygrapher who administered the tests, Tacoma Police Officer Howard Lucas. Officer Lucas was trained as a polygrapher by the State of Washington Criminal Justice Training

[3] "We hold that polygraph examination results are admissible by the defense at the sentencing phase of capital cases, subject to certain restrictions [relating to the qualification of the examiner and conditions under which the test was given]." Bartholomew, 101 Wn.2d at 646.

[4] In addition to the polygraph results, the defense at the penalty retrial argued there was doubt about premeditation because of another fact the guilt-phase jury never heard: the State's most important piece of circumstantial evidence--the murder weapon--was disassembled when it was seized by the police, but was put together before it reached the crime lab for testing. See H. Tr. 39-40. That fact called into question the crime lab tests on the gun which were used at the original trial to counter Dwayne's testimony that the gun went off accidentally. Tr. Tr. 472.

Department. R. Tr. 303-4. He had administered over 2,000 polygraph examinations for the Tacoma Police Department. R. Tr. 306. He testified he had never found a subject to be deceptive and later learned he or she was truthful. R. Tr. 307.

Officer Lucas testified he examined Rodney Bartholomew on September 23, 1981--six weeks after Dwayne's arraignment. R. Tr. 308. The tests were directed at two relevant questions: whether Rodney had helped Dwayne with the robbery, and whether he was inside the laundromat at the same time as Dwayne. Officer Lucas said he tested Rodney on these points four times, and the results indicated strongly that Rodney was being deceptive in his negative answers: under a scoring system where +6 establishes truthfulness and -6 establishes deceit (and scores between those are inconclusive), Rodney's score was -13. R. Tr. 316.

On cross-examination, Officer Lucas rejected the suggestion that Rodney's score resulted from a general sense of guilt for not stopping his brother. R. Tr. 333, 340. He explained that he talks at length with the subject before administering the polygraph tests and establishes a baseline for the individual from which his or her reactions can be judged. R. Tr. 339-40. Only the reaction to the specific question is considered in determining whether an answer shows truthfulness or deceit. R. Tr. 349. He also testified that he asked Rodney Bartholomew to return for further testing, to determine whether Rodney was in

the Laundromat when the shots were fired. R. Tr. 323, 345. He said Rodney did not return as he asked, however. Ibid.[5]

The prosecution presented no evidence at the penalty retrial which contradicted Officer Lucas or which suggested that the results of his polygraph examinations were unreliable.

2. The Proceedings Below.

Because no hearing was held in state court on the claims that Dwayne Bartholomew's rights were violated by the nondisclosure of the polygraph and the ineffectiveness of his counsel, the District Court held an evidentiary hearing on those issues. Four witnesses were called at that hearing: Michael Johnson, the prosecutor at Respondent's[6] first trial; Murray Anderson, defense counsel for his trial; David Murdach, a Tacoma defense attorney, a former deputy prosecutor and an expert polygraph examiner; and Rodney Bartholomew, the Respondent's brother and the chief witness against him at his trial.

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[5] Officer Lucas testified the polygraph testing was inconclusive as to whether Tracy Dormady was being truthful in her answers to the two questions used in her polygraph exam. R. Tr. 321. Neither of those questions went to any dispute between Tracy's version of the events and Dwayne's, and Tracy was not asked whether Rodney had helped Dwayne with the robbery. R. Tr. 321. Officer Lucas made a notation that he thought Tracy was being truthful in her answers to the questions she was asked; but he said this was a personal impression, and was not based on the polygraph results themselves. R. Tr. 321.

[6] Mr. Bartholomew, Petitioner below, is here referred to as Respondent.

Prosecutor Johnson testified that the polygraph examinations were administered to Rodney Bartholomew and Tracy Dormady at his request. H. Tr. 16. He said he recalled being informed of the results of Rodney's test, but deliberately withheld it from the prosecutor's file, and the defense. H. Tr. 15-17, 33. Although he admitted he was familiar with Washington Criminal Rule 4.7, which obligates prosecutors to disclose all statements of witnesses and all reports of experts (H. Tr. 19-20), he said he felt justified in withholding these documents because polygraphs were inadmissible under Washington law. H. Tr. 33. Mr. Johnson said he had never reduced a charge based on a polygraph result, but "I think other people in the office have, yes." H. Tr. 30. He swore he believed he had informed his co-counsel, Ellsworth Connelly, of Rodney's test results, but could not explain why the record reflects that when the issue was first raised after the original trial Mr. Connelly told the court "There weren't any polygraphs ...." H. Tr. 32.

Defense counsel Murray Anderson said his approach to Rodney at trial was to suggest that he was involved in the crime and was helping the state to save himself (H. Tr. 49); but he was unaware that Rodney had failed the polygraph on this issue (H. Tr. 36).[7]

[7] Mr. Anderson testified that he thought he learned of the polygraphs while the jury was out, and he moved for their disclosure or a mistrial. H.Tr. 36, 52-58. The record reflects no such motion, however; and Mr. Anderson's recollection on this point was contrary to Mr. Johnson's testimony (R.Tr. 23) and the findings of the Washington Supreme Court. State v. Bartholomew, 98 Wn.2d at 180.

Mr. Anderson said he discussed plea bargaining in the case with Chief Deputy Ellsworth Connelly, who in turn discussed it with Prosecuting Attorney Don Herron, but they declined to reduce the charges. H. Tr. 52.

David Murdach gave testimony as an expert on polygraph examinations. Mr. Murdach testified that he had administered over 5,000 polygraph examinations himself, and that based on his experience and the literature, he believed the results of properly conducted polygraph examinations are nearly 99% accurate. H. Tr. 71. He said he had administered many polygraph tests in connection with criminal cases, in Pierce County and elsewhere, and had testified on a few occasions where the examinations were conducted by stipulation. H. Tr. 69. He said that polygraphs are considered "routinely," in Pierce County and elsewhere, with regard to charging and plea bargaining decisions (H. Tr. 75), and "I don't think I have ever been aware of a prosecutor not dismissing if the person passed a state exam and a private exam because obviously the thrust of the prosecutor's job is to get at the truth." H. Tr. 76.

The last witness called by the Respondent at the hearing below was Rodney Bartholomew. Rodney testified that he was actually given two sets of polygraph tests, coming back a second time because he was "under the influence of drugs" during the first examination. Tr. 85-86. Rodney denied that he was ever told of the test results, and he could not recall whether he had

been asked to return again after the last test, as Officer Lucas had testified he was. H. Tr. 85, 87.[8] Rodney also said he was never contacted by Dwayne's lawyer before the trial. H. Tr. 87. On cross examination, he said that his testimony at trial was the truth. H. Tr. 88.

The State called no witnesses and presented no evidence rebutting Mr. Murdach's expert opinions regarding the standards for defense of capital cases, or the reliability of polygraph results. H. Tr. 89.

The District Court denied relief. It held that Mr. Anderson's representation was deficient and the polygraph results should have been disclosed. Pet. App. B-4, 5. But it found there was an insufficient showing of prejudice from those denials to warrant issuance of the writ, which it said required "a finding of 'a fundamental defect which inherently results in a complete miscarriage of justice.'" Pet. App. B-5, quoting Carlson v. Hong, 707 F.2d 367, 368 (9th Cir. 1983).

A panel of the Court of Appeals for the Ninth Circuit unanimously reversed on the nondisclosure issue, without reaching Mr. Bartholomew's ineffective assistance claim or his claim that the presentation of Rodney Bartholomew's testimony violated due process. Pet. App. A-12n.3. The panel opinion did not determine whether polygraph results showing a prosecution witness in a

[8] In a statement to defense counsel after Dwayne's trial, Rodney said he was asked to return after the polygraph examination, but did not.

criminal case to be lying were necessarily admissible. Pet. App. A-17. Instead, it based its judgment on the determination that the "likelihood that that disclosure of the polygraph results would have led to other admissible evidence undermining Rodney Bartholomew's or Tracy Dormady's credibility creates a reasonable probability that the jury would have convicted Dwayne Bartholomew of simple rather than aggravated first degree murder had the state disclosed those results." Pet. App. A-19. It accordingly ordered the District Court to issue a conditional writ requiring a retrial on the issue of premeditation, or a reduction in the degree of conviction. A-20.

A timely petition for rehearing and suggestion for rehearing en banc was filed by the Superintendent; it was unanimously denied, without any Circuit Judge requesting a vote on the en banc suggestion. See Appendix A. The Superintendent did not request a stay of the mandate, which then issued; and on January 13, 1995, the District Court issued the writ. Appendix B.

REASONS THE PETITION SHOULD BE DENIED

I. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS DOES NOT PRESENT THE QUESTION PRESENTED IN THE PETITION.

The sole Question Presented in the petition is whether the Due Process Clause requires prosecutors "to disclose information that neither is admissible in evidence nor will lead to admissible evidence, if the information may affect the preparation or presentation of the defense." Petition at i.

Respondent does not believe this question is presented by the decision of the Court of Appeals below.

There was no question below that the prosecution was obligated to disclose the polygraph results. That obligation was plain from the Washington court rules, as both the Supreme Court of Washington and the District Court held. See Pet. App. B-4.

The Washington Supreme Court reversed Mr. Bartholomew's death sentence, in part, because the state failed to disclose the polygraph results, which it held were admissible at sentencing. State v. Bartholomew, 101 Wn.2d 631, 646, 683 P.2d 1076 (1984). Washington Criminal Rule 4.7(a)(3) provides for the discovery of all statements of witnesses, all reports of experts, and all "material or information ... which tends to negate defendant's guilt as to the offense charged." See page 2, above.

In light of these controlling state authorities, there has never been any doubt but that the state was required to disclose the results. The sole issue below was not the disclosure obligation, but the prejudice resulting from its breach. On that point, the Court of Appeals held: "Given the closeness of the issue of premeditation, the likelihood that disclosure of the polygraph results would have led to other admissible evidence undermining Rodney Bartholomew's and Tracy Dormady's credibility creates a reasonable probability that the jury would have convicted Dwayne Bartholomew of simple rather than aggravated

first degree murder had the state disclosed those results." Bartholomew v. Wood, 34 F.3d at 876 (emphasis added).

The Court of Appeals' holding was thus premised on an indisputable point of law and a finding of fact, both of which the petition would have this Court assume. All the Court of Appeals held is that the nondisclosure of information which is clearly subject to a disclosure obligation violates due process if there is a "likelihood that disclosure ... would have led to other admissible evidence" which would have created a reasonable probability of a different result. Pet. App. A-19. That holding is neither controversial nor cert.-worthy; and it does not present the question the petition asks this Court to decide.

II. THE CASES CITED BY PETITIONER DO NOT SHOW A CONFLICT AMONG JURISDICTIONS IN THE APPLICATION OF BRADY.

Petitioner asserts that, in six Circuits, disclosure under Brady is required only "of information that itself is admissible in evidence." Petition at 14. The cases cited by petitioner simply do not support this assertion.

A few of the cases the Petitioner cites--United States v. Ramos, 27 F.3d 65 (3d Cir. 1994), and United States v. Pedraza, 27 F.3d 1515 (10th Cir. 1994)--are wholly inapposite, because they involve situations in which no Brady evidence existed at all. Similarly, United States v. Bencs, 28 F.3d 555 (6th Cir. 1994), involves not nondisclosure, but a delay in handing over Jencks material. 28 F.3d at 560-61. The Bencs court correctly

held that a Brady violation could not be made out solely on the basis of such delay. Id. at 561.

Others of Petitioner's cases involve findings by the courts involved that evidence was not material, whether or not it was admissible. See United States v. DeLuna, 10 F.3d 1529 (10th Cir. 1993); United States v. Oxman, 740 F.2d 1298 (3rd Cir. 1984), vacated on other grounds, 473 U.S. 922 (1985); United States v. Hartmann, 958 F.2d 774, 790 (7th Cir. 1992); Blackmon v. Scott, 22 F.3d 560, 564-65 (5th Cir. 1994); Nelson v. Nagle, 995 F.2d 1549 (11th Cir. 1993). The Court of Appeals below held nothing inconsistent with these cases; it just recognized that evidence which is not itself admissible may nonetheless be material for Brady purposes, because it can lead to other, admissible evidence. See Pet. App. A-17. These cases say nothing about this question.

The closest the Petitioner has come to identifying a Circuit split is in dicta from Oxman and United States v. Ranney, 719 F.2d 1183, 1190 (1st Cir. 1983), that admissibility is a prerequisite to materiality. But neither of these cases considered circumstances where the materiality of information lay in other evidence its disclosure would have led to. Ibid.; Oxman, 740 F.2d at 1311.

None of these cases involved the kind of situation to which the Court of Appeals' holding was limited: undisclosed evidence which, through not itself admissible at trial, likely lead to

admissible evidence strong enough to change the result. They thus do not establish the conflict among jurisdictions asserted by Petitioner.

As should be clear from the quotations Petitioner offers from previous Ninth Circuit law, particularly United States v. Kennedy, 890 F.2d 1056 (9th Cir. 1989), cert. denied, 494 U.S. 1008 (1990), the decision below was no departure from previous Ninth Circuit precedent, which recognized materiality from "evidence acquired through [disclosed] information...." 890 F.2d at 1059. The Petition itself cites a number of cases which have followed Kennedy in this respect: United States v. Phillip, 948 F.2d 241, 249 (6th Cir. 1991); United States v. Oliver, 908 F.2d 260, 262 (8th Cir. 1990); United States v. Derr, 990 F.2d 1330, 1336 (D.C. Cir. 1993), again dispelling the idea that this rule is unprecedented or new. No doubt, that is why no Circuit judge called for a vote on the Petition for Rehearing En Banc.

The decision below was simply an application to an unusual and particularly egregious set of facts, of established due process principles. It makes no new law that calls for this Court's review.

III. THE COURT OF APPEALS' DECISION WAS CORRECT ON OTHER GROUNDS IT DID NOT REACH.

Because the Court of Appeals decided the writ must issue based on a violation of Brady v. Maryland, 373 U.S. 83 (1963), it did not reach Mr. Bartholomew's broader claim: that due process is violated by the presentation of testimony from a witness whom the prosecutor knows, but does not disclose, has failed a polygraph on his testimony. Cf. Napue v. Illinois, 360 U.S. 264 (1959).

The requirement that criminal prosecutors refrain from presenting false testimony is related to, but distinct from, their duty to disclose exculpatory evidence. See Giglio v. United States, 405 U.S. 150, 154 (1972); Brown v. Borg, 951 F.2d 1011, 1015 (9th Cir. 1991).

A key difference between them is the test of prejudice. A conviction obtained by the knowing use of false or perjured testimony "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103 (1976) (emphasis added).

> [I]f it is established that the government knowingly permitted the introduction of false testimony reversal is "virtually automatic." United States v. Stofsky, 527 F.2d 237, 243 (2d Cir. 1975), (citing Napue v. Illinois, 360 U.S. 264, 269 .... Where the government was unaware of a witness' perjury, however, a new trial is warranted only if the testimony was material and "the court [is left] with a firm belief that but for the perjured testimony the defendant would not have been convicted." Sanders, 863 F.2d at 226; see also United States v. Seijo, 514 F.2d 1357, 1364 (2d Cir. 1975) (the test "'is whether there was a

> significant chance that this added item, developed by skilled counsel ... could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.'").

United States v. Wallach, 935 F.2d 445, 456 (2d Cir. 1991).

Application of any of these tests would require reversal here. If Rodney Bartholomew and Tracy Dormady had not testified, the prosecution's case on premeditation would have been devastated. If they had admitted that Rodney had participated in the crime, their credibility would have been equally devastated. Their testimony was the centerpiece of the state's case, and any test which focuses on the effect of their testimony would have to conclude that, if their testimony was tainted, that taint surely infected the verdict.

The broader question presented by this case, therefore, is the extent to which the presentation of a witness who has failed a polygraph violates the principle of Napue v. Illinois, 360 U.S. at 272. Napue's rule cannot be avoided by "prosecutors ... consciously avoid[ing] recognizing the obvious--that is, that [their witness] was not telling the truth." United States v. Wallach, 935 F.2d at 457. If prosecutors could withhold exculpatory evidence "on a claim that they thought it unreliable, [the state could] refuse to produce any matter whatever helpful to the defense, thus setting Brady at nought." Lindsey v. King, 769 F.2d 1034, 1040 (5th Cir. 1985). Due process is violated when testimony is presented that is false, even if it is not technically perjurious. Alcorta v. Texas, 355 U.S. 28, 31

(1957); Barbee v. Warden, 331 F.2d 842, 845 (4th Cir. 1964); Turner v. Ward, 321 F.2d 918, 920 (10th Cir. 1963).

This duty was not dependent on the admissibility of that evidence--just as a defense lawyer's duty not to present perjured testimony arises despite the clear inadmissibility at trial of testimony about any attorney-client conference in which the intent to commit perjury was revealed. See Nix v. Whiteside, 475 U.S. 157, 172 (1986).

Admissible or not, polygraph evidence is highly probative. That was the uncontradicted testimony of Officer Lucas and Mr. Murdach, and a fact recognized by many courts.

> [E]ven the most ardent detractors from the validity of polygraph evidence concede that a degree of reliability of 70% or higher for properly administered examinations. Further, a large portion of this 30% 'error' rate includes tests that yield inconclusive results--results that cannot fairly be described as 'erroneous.'

McMorris v. Israel, 643 F.2d 458, 461-62 (7th Cir. 1981) (footnotes omitted).

> Certainly, as noted by the Eighth Circuit, polygraph examinations are reliable enough to pass the usual threshold for 'relevant' evidence. United States v. Oliver, 525 F.2d 731, 737n.11 (8th Cir. 1975); Fed. R. Evid. 401. A similar judgment is implicit in this court's consistent rulings that district courts have discretion to admit polygraph results in a proper case. [citations omitted.]

Id. at 643 F.2d 462 n.9[9] Without some contrary evidence from

[9] The State of Washington holds polygraph results admissible by stipulation, State v. Renfro, 96 Wn.2d 902, 639 P.2d 737 (1982), and for a variety of limited legal purposes. See, e.g., O'Hartigan v. Department of Personnel, 48 Wn.2d 41, 821 P.2d 44 (1991); State ex rel. Taylor v. Reay, 61 Wn.App. 141, (continued...)

the state, the polygraph results compel the conclusion that Rodney's testimony, more probably than not, was false.

The appeal below did raise an important and novel legal issue: whether due process required the disclosure and admission of polygraph results showing a state's witness was lying, or some other remedy faithful to the Napue principle. Respondent submits that it does--that fundamental fairness does not permit the prosecution in a criminal case to put on evidence it has good reason to believe is perjured, without disclosing the reasons to doubt it. That principle, and this Court's recent overruling of Frye v. United States, 293 Fed. 1013 (D.C. Cir. 1923), in Daubert v. Merrell Dow, 113 S.Ct. 2786 (1983)--strongly supports an argument that such disclosure and admission is constitutionally required.

The Court of Appeals wisely did not reach that issue, but decided this case on the narrower, fact-specific ground discussed in part II, above. However, if this Court decides to grant review, it should consider this broader constitutional basis for upholding the Court of Appeals' judgment, as well.

[9](...continued) 810 P.2d 512 (1991); State v. Cherry, 63 Wn. App. 301, 810 P.2d 940 (1991); State v. Bartholomew, supra.

CONCLUSION

The petition for a writ of certiorari should be denied.

DATED this 20 day of March, 1995.

Respectfully submitted,

TIMOTHY K. FORD
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(206) 622-1604
Attorney for Respondent

No. 94-1419

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

TANA WOOD, Superintendent,

Petitioner,

v.

DWAYNE EARL BARTHOLOMEW,

Respondent.

CERTIFICATE OF SERVICE

TIMOTHY K. FORD hereby certifies that on the 20th day of March, 1995, he deposited in the United States Mail, first class postage prepaid, a copy of the Brief in Opposition and Motion to Proceed in Forma Pauperis in this case, addressed to:

Thornton Wilson
Assistant Attorney General
Attorney General's Office
Corrections Division
P.O. Box 40116
Olympia, WA 98504-0116

Timothy K. Ford
Attorney for Respondent

NOT FOR PUBLICATION

FILED

NOV 16 1994

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DWAYNE EARL BARTHOLOMEW, Petitioner-Appellant, v. TANA WOOD, Superintendent of the Washington State Penitentiary, Respondent-Appellee.	)	No. 93-35549 D.C. No. CV 91-5102RJB ORDER

Before: WRIGHT, TANG, and REINHARDT, Circuit Judges.

The panel has voted to deny appellees' petition for rehearing. Judge Wright makes no recommendation with reference to the suggestion for rehearing en banc. Judge Tang recommends rejection of the suggestion for rehearing en banc and Judge Reinhardt has voted to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX A

AO 450 (Rev. 5/85) (Mod. 10/93) Judgment in a Civil Case o

United States District Court
WESTERN DISTRICT OF WASHINGTON

DWAYNE EARL BARTHOLOMEW,

vs.

TANA WOOD, Superintendent of the Washington State Penitentiary,

JUDGMENT IN A CIVIL CASE

CASE NUMBER: C91-5102RJB

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[✓] **Decision by Court.** This action came to consideration before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The State of Washington shall afford Petitioner a new trial on the issue of premeditation within a reasonable period of time, or shall reduce his degree of conviction to simple first degree murder.

FILED LODGED
RECEIVED
JAN 13 1995
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA
BY DEPUTY

ENTERED
ON DOCKET
JAN 13 1995
By Deputy CMG

1/13/95
Date

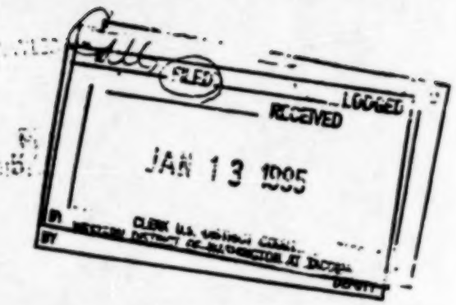
BRUCE RIFKIN
Clerk

Caroline M Gonzalez
(By) Deputy Clerk

APPENDIX B

ENTERED ON DOCKET
JAN 13 1995
By Deputy

RECEIVED
MacDONALD, HOAGUE & BAYLESS
JAN 17 1995



C/2
RJB

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DWAYNE EARL BARTHOLOMEW,

Petitioner,

v.

TANA WOOD, Superintendent of the Washington State Penitentiary,

Respondent.

CASE NO. C91-5102RJB

ALTERNATIVE WRIT OF HABEAS CORPUS

THIS MATTER comes before the court on the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit in *Bartholomew v. Wood*, 34 F.3d 870 (9th Cir. 1994) (CCA No. 93-35549), and on Petitioner's Request for Entry of Judgment.

In accord with the Judgment of the United States Court of Appeals for the Ninth Circuit, it is hereby

ORDERED as follows:

The State of Washington shall afford Petitioner a new trial on the issue of premeditation within a reasonable period of time, or shall reduce his degree of conviction to simple first degree murder.

The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

DATED this 13 day of Jan, 19 95.

Robert J. Bryan
United States District Judge

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ROBERT A. FREE
HAROLD H. GREEN
ESTER GREENFIELD
KEVIN LEDERMAN
KENNETH A. MacDONALD
FREDERICK L. NOLAND
FRANK H. RETMAN
DAVID M. "MAC" SHELTON
DANIEL HOYT SMITH
KATHLEEN WAREHAM

March 20, 1995

Hon. William K. Suter, Clerk
Supreme Court of the United States
1 First Street N.E.
Washington, D.C. 20543

Re: Wood v. Bartholomew, No. 94-1419

Dear Mr. Suter:

Enclosed please find the Brief in Opposition in this case, a Motion to Proceed In Forma Pauperis, and a Certificate of Service.

Thank you.

Sincerely,

MacDONALD, HOAGUE & BAYLESS

Timothy K. Ford

TKF/ls
Enclosures

cc: Thornton Wilson
Dwayne Bartholomew

SUPREME COURT OF THE UNITED STATES

TANA WOOD, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY *v.* DWAYNE EARL BARTHOLOMEW

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 94–1419. Decided October 10, 1995

PER CURIAM.

The Court of Appeals for the Ninth Circuit reversed the District Court's denial of habeas relief based on its speculation that the prosecution's failure to turn over the results of a polygraph examination of a key witness might have had an adverse effect on pretrial preparation by the defense. The Court of Appeals assumed, and the parties do not dispute, that the results were inadmissible under state law both for substantive purposes as well as for impeachment. The decision below is a misapplication of our *Brady* jurisprudence, see *Brady* v. *Maryland*, 373 U. S. 83 (1963), and we accordingly reverse the judgment of the Court of Appeals and remand for further proceedings.

I

On August 1, 1981, respondent Dwayne Bartholomew robbed a laundromat in Tacoma, Washington. In the course of the robbery, the laundromat attendant was shot and killed. Two shots were fired: one hit the attendant in the head, the second lodged in a counter near the victim's body. From the beginning, respondent admitted that he committed the robbery and that the shots came from his gun.

The only issue at trial was whether respondent was guilty of aggravated first-degree murder, which requires proof of premeditation; or of first-degree (felony) mur-

der, which does not. Respondent's defense was that the gun, a single action revolver (one that must be cocked manually before each shot), discharged by accident—*twice*.

In addition to the physical evidence concerning the operation of the gun, the prosecution's evidence consisted of the testimony of respondent's brother, Rodney Bartholomew, and of Rodney's girlfriend, Tracy Dormady. Both Rodney and Tracy testified that on the day of the crime they had gone to the laundromat in question to do their laundry, and that respondent was sitting in his car in the parking lot when they arrived. While waiting for their laundry, Rodney sat with his brother in the car. Rodney testified that respondent told him that he intended to rob the laundromat and "leave no witnesses." According to their testimony, Rodney and Tracy left the laundromat soon after the conversation and went to Tracy's house. Respondent arrived at the house a short time later, and when Tracy asked respondent if he had killed the attendant respondent said "he had put two bullets in the kid's head." Tracy also testified that she had heard respondent say that he intended to leave no witnesses. Both Rodney and Tracy's testimony was consistent with their pretrial statements to the police. *State* v. *Bartholomew*, 98 Wash. 2d 173, 176–178, 654 P. 2d 1170, 1173–1174 (1982).

Respondent testified in his own defense. He admitted threatening the victim with his gun and forcing him to lie down on the floor. Respondent said, however, that while he was removing money from the cash drawer his gun accidently fired, discharging a bullet into the victim's head. Respondent further claimed that the gun went off a second time while he was running away. Respondent denied telling Rodney or Tracy that he intended to leave no witnesses. According to his testimony, moreover, Rodney had assisted in the robbery by convincing the attendant to open the laundromat's door after it had closed for the night, although Rodney left before the crime was committed. *Ibid.* In closing

argument the defense sought to discredit Rodney and Tracy's testimony by suggesting that they were lying about the extent of Rodney's participation in the crime. 34 F. 3d 870, 872 (CA9 1994).

At the sentencing phase of the trial (respondent was sentenced to death but his sentence was overturned on appeal and he was resentenced to life imprisonment without the possibility of parole), the prosecution's first witness was respondent's cellmate, Stanley Bell. Bell testified that respondent told him that he made the victim lie on the floor, asked him his age, found out it was 17, replied "[t]oo bad," and shot him. See *State* v. *Bartholomew*, *supra*, at 178, 654 P. 2d, at 1174.

Before trial, the prosecution requested that Rodney and Tracy submit to polygraph examinations. The answers of both witnesses to the questions asked by the polygraph examiner were consistent with their testimony at trial. As part of the polygraph examination, the examiner asked Tracy whether she had helped respondent commit the robbery and whether she had ever handled the murder weapon. Tracy answered in the negative to both questions. The results of the testing as to these questions were inconclusive, but the examiner noted his personal opinion that her responses were truthful. The examiner also asked Rodney whether he had assisted his brother in the robbery and whether at any time he and his brother were in the laundromat together. Rodney responded in the negative to both questions, and the examiner concluded that the responses to the questions indicated deception. Neither examination was disclosed to the defense.

After exhausting his state remedies, respondent filed a habeas action in the District Court for the Western District of Washington, raising, *inter alia*, a *Brady* claim based on the prosecution's failure to produce the polygraph examinations. The District Court denied the writ, concluding that respondent "fails . . . to show that *evidence* was withheld. *The information withheld only possibly could have led to some admissible evidence*. He

fails to show that disclosure of the results of the polygraph to defense counsel would have had a reasonable likelihood of affecting the verdict." App. to Pet. for Cert. B5 (emphasis in original).

On appeal, the Ninth Circuit reversed. 34 F. 3d 870 (1994). The Court of Appeals noted that under Washington law polygraphic examinations are inadmissible in evidence, even for impeachment purposes. See *id.*, at 875 (citing *State* v. *Ellison*, 36 Wash. App. 564, 676 P. 2d 531 (1984)). The court nevertheless reversed the District Court's denial of the writ, concluding that although the results would have been inadmissible at trial, the information was material under *Brady*. The Court reasoned that "[h]ad [respondent's] counsel known of the polygraph results, he would have had a stronger reason to pursue an investigation of Rodney's story;" that he "likely would have taken Rodney's deposition" and that in that deposition "might well have succeeded in obtaining an admission that he was lying about his participation in the crime" and "would likely have uncovered a variety of conflicting statements which could have been used quite effectively in cross-examination at trial." 34 F. 3d, at 875–876.

II

If the prosecution's initial denial that polygraph examinations of the two witnesses existed were an intentional misstatement, we would not hesitate to condemn that misrepresentation in the strongest terms. But as we reiterated just last Term, evidence is "material" under *Brady*, and the failure to disclose it justifies setting aside a conviction, only where there exists a "reasonable probability" that had the evidence been disclosed the result at trial would have been different. *Kyles* v. *Whitley*, 514 U. S. ___ (1995) (slip op., at 14–15); *United States* v. *Bagley*, 473 U. S. 667, 682 (1985) (opinion of Blackmun, J.); *id.*, at 685 (White, J., concurring in part and concurring in judgment). To begin with, on the Court of Appeals' own assumption,

the polygraph results were inadmissible under state law, even for impeachment purposes, absent a stipulation by the parties, see 34 F. 3d, at 875 (citing *State* v. *Ellison*, *supra*), and the parties do not contend otherwise. The information at issue here, then—the results of a polygraph examination of one of the witnesses—is not "evidence" at all. Disclosure of the polygraph results, then, could have had no direct effect on the outcome of trial, because respondent could have made no mention of them either during argument or while questioning witnesses. To get around this problem, the Ninth Circuit reasoned that the information, had it been disclosed to the defense, might have led respondent's counsel to conduct additional discovery that might have led to some additional evidence that could have been utilized. See 34 F. 3d, at 875. Other than expressing a belief that in a deposition Rodney might have confessed to his involvement in the initial stages of the crime—a confession that itself would have been in no way inconsistent with respondent's guilt—the Court of Appeals did not specify what particular evidence it had in mind. Its judgment is based on mere speculation, in violation of the standards we have established.

At trial, respondent's strategy was to discredit Rodney's damaging testimony by suggesting that Rodney was lying in order to downplay his own involvement in the crime. *Id.*, at 872. That strategy did not involve deposing Rodney. It is difficult to see, then, on what basis the Ninth Circuit concluded that respondent's counsel would have prepared in a different manner, or (more important) would have discovered some unspecified additional evidence, merely by disclosure of polygraph results that, as to two questions, were consistent with respondent's pre-established defense.

In speculating that the undisclosed polygraph results might have affected trial counsel's preparation, and hence the result at trial, the Ninth Circuit disagreed with, or disregarded, the view of respondent's own trial counsel. At the evidentiary hearing held in the Federal

District Court in this habeas action, respondent's habeas counsel questioned trial counsel on the importance of the polygraph results:

> "Q: And you indicated that your cross-examination of Rodney was, I think, somewhat limited because of concern that—
> "A: It was limited in my own respect. Nobody tried to limit me. In my opinion, as a trial lawyer, that was a very dangerous witness to me, and I wanted to get as much as I could out of him without recalling the crystal words again. Leave no prisoners.
> "Q: Do you think it would have been any help to you in doing that, if you had known of specific questions regarding the offense on which Mr. Rodney Bartholomew had failed a polygraph examination? Would that have perhaps affected the shape of your cross-examination of him?
> "A: I think in retrospect they're almost parallel. The questions that he failed were his contribution or implication in the offense, the holdup, with Mr. Dwayne Bartholomew. I believe they were in gloves, so in retrospect they wouldn't have affected it. I would have liked to have known it, Mr. Ford, but I don't think it would have affected the outcome of the case." Tr. 55–56.

Trial counsel's strategic decision to limit his questioning of Rodney undermines the suggestion by the Court of Appeals that counsel might have chosen to depose Rodney had the polygraph results been disclosed. But of even greater importance was counsel's candid acknowledgement that disclosure would not have affected the scope of his cross-examination. That assessment is borne out by the best possible proof: the Federal District Court below went so far as to permit respondent's habeas counsel, armed with the information about the polygraph examinations, to question Rodney under oath. Even though respondent's counsel was permitted to refer

to the polygraph results themselves—reference to which would not be permissible on retrial—counsel obtained no contradictions or admissions out of Rodney. See *id.*, at 84–87.

In short, it is not "reasonably likely" that disclosure of the polygraph results—inadmissible under state law—would have resulted in a different outcome at trial. Even without Rodney's testimony, the case against respondent was overwhelming. To acquit of aggravated murder, the jury would have had to believe that respondent's single action revolver discharged accidently, not once but twice, by tragic coincidence depositing a bullet to the back of the victim's head, execution-style, as the victim lay face down on the floor. In the face of this physical evidence, as well as Rodney and Tracy's testimony—to say nothing of the testimony by Bell that the State likely could introduce on retrial—it should take more than supposition on the weak premises offered by respondent to undermine a court's confidence in the outcome.

Whenever a federal court grants habeas relief to a state prisoner the issuance of the writ exacts great costs to the State's legitimate interest in finality. And where, as here, retrial would occur 13 years later, those costs and burdens are compounded many times. Those costs may be justified where serious doubts about the reliability of a trial infested with constitutional error exist. But where, as in this case, a federal appellate court, second-guessing a convict's own trial counsel, grants habeas relief on the basis of little more than speculation with slight support, the proper delicate balance between the federal courts and the States is upset to a degree that requires correction.

* * *

The petition for certiorari is granted, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this

opinion. The respondent's motion to proceed *in forma pauperis* is granted.

It is so ordered.

JUSTICE STEVENS, JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER dissent from summary disposition of this case.